

JURDEN, J.

This case comes before the Court on appeal from the Division of Long Term Care Residents Protection (“Division”). The Division issued a decision finding that Elizabeth Munyori (“Appellant”) committed emotional abuse as defined by 16 *Del. C.* §1131, and placed her on the Adult Abuse Registry (“Registry”) for a period of two years. For the reasons stated below, the decision of the Division is **AFFIRMED**.

I. BACKGROUND

On January 16, 2004, the victim, Ruth Wintrop (“Wintrop”), alleged an incident of abuse against the Appellant, who was working the 11 p.m.-7 a.m. shift at Millcroft Assisted Living Facility. The pertinent facts are as follows. At approximately 5 a.m., Wintrop rang her call bell and the Appellant responded. The Appellant provided Wintrop with a bedpan and then left the room. When the Appellant returned, she spilled some of the contents of the bedpan on the sheets, became frustrated, and flipped the sheet over Wintrop’s head. At approximately 7 a.m., Sharon Harrop (“Harrop”), the charge nurse on the 7 a.m.-3 p.m. shift, spoke to Wintrop while completing her rounds. Harrop testified that Wintrop was very tearful and became more so as she told Harrop about the incident. Harrop further testified that Wintrop’s demeanor was as if she had been waiting to tell someone about the incident since it had occurred. At 8:30 a.m. that morning, approximately three hours after the incident occurred, Harrop reported the incident to Cyndi Brown-Spellman (“Brown-Spellman”), the Director of Health Services at Millcroft. Brown-Spellman immediately went to speak with Wintrop about the incident. She testified that Wintrop was still visibly upset and described her demeanor as agitated, frustrated and disappointed. During her discussion with Brown-Spellman, Wintrop did not identify the Appellant by name, but was able to provide a description that eliminated all

other Certified Nursing Assistants (“CNAs”) on duty during the shift in question. The Human Resources Department at Millcroft contacted the Appellant and told her not to report to work the next day, consistent with standard operating procedure for instances of alleged abuse. Thereafter, on January 16, 2004, the Appellant was terminated. On March 30, 2004, the Appellant’s name was entered on the Adult Abuse Registry for neglect and her name was placed on the Certified Nursing Aide Registry. Following a review of the evidence, the Hearing Officer concluded that Appellant was guilty of emotional abuse. The Officer further stated that the incident in question was an overt act rather than a mere oversight and, while the Appellant’s conduct did not physically injure Wintrop, it was clear and understandable that the incident promoted both fear and anxiety in Wintrop. In light of this, the Officer concluded that the State’s recommendation for a two year listing on the Adult Abuse Registry was reasonable. The Appellant timely appealed to this Court.

II. ISSUES RAISED ON APPEAL

Appellant presents four issues for consideration:

- i. Is the decision of the Hearing Officer supported by substantial/non-hearsay evidence?
- ii. Did the Hearing Officer err as a matter of law in finding that hearsay evidence was admissible, and by basing his decision solely on hearsay evidence?
- iii. Were the Appellant’s constitutional due process rights violated because the Division of Long Term Care has not established rules governing the

procedures and scope of the administrative hearing as well as the powers of the Hearing Officer?

- iv. Did the Hearing Officer err as a matter of law by ruling that the Administrative Procedure Act applies to this matter?

III. STANDARD OF REVIEW

A decision rendered by the Department of Health and Social Services (“DHSS”) is appealable on the record.¹ In reviewing a DHSS decision, this Court must determine whether the Board’s findings are supported by substantial evidence and whether its legal conclusions are free from error.² In looking for “substantial evidence,” the Court looks for “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”³ Moreover, “[i]t is not the appellate court’s role to weigh the evidence, determine credibility questions or make its own factual findings, but merely to decide if the evidence is legally adequate to support the agency’s factual findings.”⁴ With respect to any discretionary decisions made by the agency, the Court must determine that they were not made either arbitrarily or capriciously.⁵

¹ 11 *Del. C.* § 8564(b).

² *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265 (Del. 1981); *Ponchvatilla v. U.S. Postal Serv.*, Del. Super., C.A. No. 96A-06-19, Cooch, J. (June 9, 1997).

³ *Gorrell v. Division of Vocational Rehab.*, Del. Super., C.A. No. 96A-01-001, Graves, J. (July 31, 1996) (Letter Op.), at 4.

⁴ *McManus v. Christiana Serv. Co.*, Del. Super., C.A. No. 96A-06-013, Silverman, J. (Jan 31, 1997) (Op. And Order), at 4.

⁵ *Warmouth v. Delaware State Bd. of Examiners in Optometry*, 514 A.2d 1119, 1208 (Del. Super. 1985).

IV. DISCUSSION

A. Is the decision of the Hearing Officer supported by substantial/non-hearsay evidence?

Appellant asserts that her state and federal constitutional due process right to a fair hearing was violated by a decision unjustifiably based exclusively on hearsay. Appellant further argues that the legal residuum rule must be satisfied regardless of the admissibility of Wintrop's statement.⁶ The Division asserts that Appellant was afforded all due process rights guaranteed under Delaware law. The Division argues that Wintrop's description of the events in question fell within an exception to the hearsay rule, Rule 803 of the Delaware Rules of Evidence, because her statement constitutes an excited utterance. Therefore, according to the Division, Wintrop's statement is admissible, can legitimately serve as the foundation for the Hearing Officer's decision, and is sufficient to demonstrate a residuum of legal evidence.⁷

In *Barnett v. Division of Motor Vehicles*, the Court determined that the decision of an Administrative Hearing Officer cannot be based solely on legally inadmissible evidence.⁸ However, the ruling in *Barnett* does not apply to this case because the evidence in question in this case is legally admissible under the Delaware Rules of Evidence.⁹ *Bell Atlantic – Delaware, Inc. v. Public Service Com'n*¹⁰ sets forth the

⁶ 16 *Del. C.* §5601, "Findings of fact must be supported by at least some evidence which is admissible in a court of law."

⁷ 16 *Del. C.* § 5601.

⁸ *Barnett v. Division of Motor Vehicles*, 514 A.2d 1145, 1147 (Del. Super. 1986).

⁹ D.R.E. 803(2).

elements necessary for an administrative hearing to satisfy the requirement of procedural due process:

due process as it relates to the requisite characteristics of the proceedings entails providing the parties to the proceeding with the opportunity to be heard, by presenting testimony or otherwise, and the right of controverting, by proof, every material fact which bears on the question of right in the matter involved in an orderly proceeding appropriate to the nature of the hearing and adapted to meet it's ends. This court has also held that due process requires that the notice inform the party of the time, place, and date of the hearing and the subject matter of the proceedings.”¹¹

After reviewing the record, the Court finds that all of the above conditions were clearly met and, therefore, there is no basis for the Court to remand the decision back to the Division for reconsideration on the basis of failing to satisfy Appellant's due process rights. In addition, the Court also finds that applicable evidentiary statutes were satisfied and the statement in question was adequate to form the basis of the Hearing Officer's decision. This Court has repeatedly ruled that no residuum of legal evidence is required in administrative proceedings.¹²

B. Did the Hearing Officer err as a matter of law in finding that hearsay evidence was admissible, and by basing his decision solely on hearsay evidence?

¹⁰ *Bell Atlantic – Delaware, Inc. v. Public Service Com'n*, 705 A.2d 601, 605 (Del. Super. 1997).

¹¹ *J.L.B. Corp. v. Delaware A.B.C.C.*, 1985 Del. LEXIS 1204 (Del. Super.).

¹² *Crooks v. Draper Canning Co.*, 633 A.2d 369 (Del. Super. 1993).

Appellant asserts that her due process rights were violated because she was denied the right to confront and cross-examine her accuser. In *Crawford v. Washington*, the Supreme Court ruled that the Confrontation Clause bars the admission of a “testimonial statement” if the declarant is not subject to cross-examination or if the defendant did not have a prior opportunity for cross-examination. *Crawford* further states that confrontation is the only indicium of reliability sufficient to satisfy Constitutional demands.¹³ The Division asserts that Appellant was notified of the State’s intent to release Wintrop from the joint subpoena five days prior to the scheduled hearing, and Appellant made no attempt to contest the release or otherwise protect her interest in having Wintrop testify in person. In addition, the Division argues that the Hearing Officer made a judgement stating that Wintrop was legitimately unable to testify and, therefore, there can be no due process violation in releasing a witness from a subpoena when that witness has been deemed incompetent to testify.

The Court finds that Appellant’s due process rights were not violated by the admission of Wintrop’s testimonial statement in lieu of her appearance at the hearing. The Court upholds the Hearing Officer’s determination that Wintrop was not qualified to testify under §3516(b)(2)a3,¹⁴ and finds that due process requirements are not applicable in this case because the Constitution applies only to criminal proceedings, and administrative hearings are not subject to such strident rules of law.

¹³ *Crawford v. Washington*, 541 U.S. 36 (2004).

¹⁴ “An out-of-court statement may be admitted if the victim is found by the court to be unavailable to testify because of the victim’s total failure of memory due to age or other infirmity.”

C. Were the Appellant's Constitutional due process rights violated because the Division of Long Term Care has not established rules governing the procedures and scope of the administrative hearings as well as the powers of the Hearing Officer?

Appellant asserts that her Constitutional rights were violated because the Adult Abuse Registry Hearing is a quasi-criminal proceeding subject to some aspects of criminal procedural and evidentiary statutes, yet the Division has no rules governing the Division's procedures, the scope of the hearing, or the powers of the Hearing Officer. The Division asserts that the issue of quasi-criminality should not be an issue in this appeal because Appellant fails to give any reason or cite any cases that illustrate why the Hearing should qualify as such. In addition, Appellant fails to satisfy the conditions in *State v. Grace* under which a proceeding can be viewed as quasi-criminal.

The ruling in *Grace* states that the motivation behind the statute in question is important in determining its qualification as quasi-criminal.¹⁵ There are two central elements in the determination of quasi-criminality as set out by *Grace*.¹⁶ The first element is the purpose of the statute and the nature of the consequences imposed upon the accused.¹⁷ As the sole purpose of the Adult Abuse Registry is protection of the individuals under the care of federally certified facilities, and the sole recourse of the Hearing Officer is to place the individual in question on the Adult Abuse Registry; there

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

is no evidence of the ability to “punish” the individual.¹⁸ The Court agrees that the Hearing in question does not qualify as quasi-criminal.¹⁹

D. Did the Hearing Officer err as a matter of law by ruling that the Administrative Procedures Act applies to this matter?

The Appellant asserts that the State relied on an unconstitutional code, the Administrative Procedures Act, to support the admission of hearsay statements, which constitutes a legal error requiring reversal of the decision according to the Appellant. In the event that the Court finds §3516 is constitutional and that it is applicable in this case, the Division failed to satisfy the requirements that would allow Wintrop to be excused from testifying.²⁰ Appellant further argues that by failing to produce medical testimony or provide a proper foundation to establish the qualifications of lay witnesses to address Wintrop’s mental or physical condition, the Division did not satisfy §3516(b)(2)a5 and Wintrop’s out-of-court statements were admitted erroneously. The Division asserts that sufficient evidence existed to sustain the findings of the Hearing Officer, and because §3516 was not the foundation for the Hearing Officer’s decision, its applicability should not be considered in this appeal.

The Court finds that the ruling of the Hearing Officer as to the applicability of §3516 is sound, §3516 is contained in 11 *Del. C.* “Crimes and Criminal Procedure,” and thus it is clear that the statute is intended to apply only to criminal proceedings. The Hearing in question is clearly not a criminal proceeding and there are no criminal

¹⁸ 11 *Del. C.* §8564(b).

¹⁹ *State v. Grace*, Del.Supr., 286 A.2d 754 (1971).

²⁰ 11 *Del. C.* §3516.

penalties involved, therefore, it does not meet the requirements to establish quasi-criminality set out by the Court in *Grace*.²¹ The Court further finds that were §3516 to be considered applicable, the Defense adequately proved that §3516(b)(2)(b) was satisfied. The statement in question contained particularized guarantees of trustworthiness that would qualify it to serve in the place of a witness that was either unavailable or unable to testify.²²

V. CONCLUSION

A review of the record satisfies the Court that the Division's findings of fact and conclusions of law are supported by substantial evidence and are free from legal error. Considering the foregoing, the Division's decision to place the Appellant on the Registry for a period of two years after a finding of abuse is **AFFIRMED**.

IT IS SO ORDERED

Jan R. Jurden, Judge.

²¹ *State v. Grace*, 286 A.2d 754 (Del. Super. 1971).

²² 11 *Del. C.* §3516(b)(2)(b).